

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

JASON TRAVIS STEVENS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 01-7-P-H
	)	
LEN SHERWOOD, et al.,	)	
	)	
Defendants	)	

**Recommended Decision on Motion for Summary Judgment on  
a 42 U.S.C. § 1983 Complaint**

This is an action filed by Jason Travis Stevens alleging a violation of his constitutional rights and seeking damages pursuant to 42 U.S.C. § 1983. (Docket No. 2.) Defendant Len Sherwood has filed a motion for summary judgment (Docket No. 43) and Stevens has failed to respond to the motion. I granted Stevens extensions of time in which to respond to the pending motion, the most recent being an extension to February 19, 2002. Based upon the record before me, I now recommend that the court **GRANT** the motion for summary judgment.

**Summary Judgment Standard**

A party moving for summary judgment is entitled to a favorable judgment only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The court views the record on summary judgment in the light most favorable to the non-movant. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 50 (1st Cir.

2000). Stevens has not responded to the motion and has therefore waived any objection to the motion and empowered the court to act on Sherwood's motion. Provencher v. United States, 1999 WL 1995211, \*2 (D. Me. 1999). Because Stevens has failed to file a timely response to Sherwood's motion for summary judgment he "is deemed to have consented to the moving party's statement of facts to the extent it is supported by appropriate record citations." Winters v. FDIC, 812 F. Supp. 1, 2 (D. Me. 1992).

However, "[t]he failure of the nonmoving party to respond to a summary judgment motion does not in itself justify summary judgment." Lopez v. Corporacion Azucarera de Puerto Rico, 938 F.2d 1510, 1517 (1<sup>st</sup> Cir. 1991). It is incumbent upon the moving party to demonstrate undisputed facts entitling it to summary judgment as a matter of law. Id. "It is well-established law in this district" that Federal Rule of Civil Procedure 56 "requires the Court to examine the merits of a motion for summary judgment even though a nonmoving party fails to object." Winters, 812 F.Supp. at 2.

### **Undisputed Facts**

The facts are taken from Sherwood's Statement of Material Facts to the extent those facts are supported by the affidavit of Len Sherwood and Exhibits 1 through 13 that Sherwood has filed in support of his motion. Those facts reveal that Jason Stevens is a federal prisoner who was incarcerated at the United States penitentiary at Allenwood, Pennsylvania since 1998. On November 29, 2000, he was transferred to the Maine Correctional Center in Windham. Stevens arrived from the federal facility with three prescribed medications: Midrin for migraine headaches, Benadryl for insomnia, and Ibuprofen for back and foot pain.

Sherwood is a physician's assistant who was employed at Windham to provide health care to inmates there. Sherwood, after reviewing Stevens's chart, determined that he would discontinue the Benadryl and prescribe Midrin and Tylenol as needed for migraine headaches and Motrin for back pain. He also ordered a routine urine culture. The next day Sherwood attempted to perform an intake examination. Stevens was upset and agitated because his previously prescribed medications had been discontinued. Sherwood determined that he could not conduct the examination until Stevens calmed down. Sherwood then discontinued all medications, as of November 30, 2000, until he was able to complete blood work and other physical examinations of Stevens.

Stevens put in several requests to be seen by the medical staff. On December 12, 2000, he requested that his medications be restored. When his medications were not restored he revoked his consent to treatment by Prison Health Services, Sherwood's employer. On December 18, 2000, he rescinded that revocation. In the interim, on December 15, 2000, Stevens suffered a migraine attack and was given Midrin by a physician other than Sherwood.

On December 20, 2000, Sherwood examined Stevens and completed his intake work. Sherwood resumed the order for Midrin in the event of a migraine attack and additionally ordered Toradol in the event that Midrin did not work. Sherwood restarted the Motrin and prescribed Atarax as a sleep agent in place of Benadryl. He also ordered some other blood tests and a chest x-ray. On December 28, Stevens complained that he was not receiving the Atarax as prescribed and Sherwood directed the nursing staff to comply. Sherwood also treated Stevens for hepatitis-C and referred him to the prison psychiatrist. Stevens did not complete the paperwork to be seen by that individual.

Sherwood's last treatment of Stevens was on February 20, 2001. Stevens was transferred from Windham on April 13, 2001.

### **Discussion**

Although the complaint claims that Sherwood failed or refused to provide treatment or necessary medications, the record developed by Sherwood suggests nothing more than a dispute between Stevens and Sherwood over the nature of the appropriate treatment. Sherwood argues that there are no facts in the record that would support a claim for a constitutional violation.

Stevens's claim rises to the level of a constitutional violation only if Sherwood exhibited "deliberate indifference to serious medical needs." Watson v. Caton, 984 F.2d 537, 540 (1st Cir. 1993) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). "The courts have consistently refused to create constitutional claims out of disagreements between prisoners and doctors about the proper course of a prisoner's medical treatment, or to conclude that simple medical malpractice rises to the level of cruel and unusual punishment." Id.

While Stevens's complaint describes a serious medical condition, migraine headaches and a psychiatric disorder (Complaint, ¶¶ 6–7), the record does not contain any facts that would suggest that Sherwood's "medical judgment was absurd or that improper reasons were given for refusing treatment." Watson, 984 F.2d at 540. The court is left with disputed allegations between a prisoner and a physician's assistant about the type of treatment rendered. The only record evidence developed on this motion supports the notion that Sherwood's medical decisions, even if questionable, were not made in disregard of Stevens's serious medical needs. Furthermore, while the record does support

the fact that Stevens had serious medical needs, during the course of his stay at Windham he did indeed receive various treatments for those needs. On this record the dispute between Sherwood and Stevens does not rise to the level of a constitutional violation.

### **Conclusion**

Based upon the foregoing I recommend that the court **GRANT** defendant Sherwood's motion for summary judgment.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

March 18, 2002

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Margaret J. Kravchuk  
U.S. Magistrate Judge

BANGOR PR1983

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-7

STEVENS v. SHERWOOD, et al

Filed: 01/09/01

Assigned to: JUDGE D. BROCK HORNBY

Demand: \$0,000

Nature of Suit: 555

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 42:1983 Prisoner Civil Rights

JASON TRAVIS STEVENS

JASON TRAVIS STEVENS

plaintiff

[COR LD NTC pse] [PRO SE]

USM REG. NO. 10182-036

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Assistant, Prison Health

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